Supreme Court, U.S.
FILED
FEB 26 2003

No. 02-361

In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

	Page
I. CIPA does not induce public libraries to violate any First Amendment rights of their patrons	1
A. Strict scrutiny does not apply to a public library's content-based collection decisions	2
B. A library's internet-connected computers are not analogous to a traditional public forum	7
C. A public library's internet-connected computers are not designated public fora, but even if they were, the library's content-based collection decisions would not be subject to strict scrutiny	8
D. Filtering software is a reasonable means for a library to ensure that it does not furnish pornography to its patrons	11
II. CIPA does not impose an unconstitutional condition on the receipt of federal assistance	16

TABLE OF AUTHORITIES

Cases:

Arkansas Educ. Television Comm'n v. *Forbes*, 523 U.S. 666 (1998)	3, 7
City of Madison v. *Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976)	11
Cornelius v. *NAACP Legal Def. & Educ. Fund*, 473 U.S. 788 (1985)	9
Denver Area Educ. Telecomm. Consortium, Inc. v. *FCC*, 518 U.S. 727 (1996)	14
FCC v. *League of Women Voters*, 468 U.S. 364 (1984)	19
First Nat'l Bank v. *Bellotti*, 435 U.S. 765 (1978)	20

Cases—Continued: Page

International Soc'y for Krishna Consciousness, Inc. v. *Lee*, 505 U.S. 672 (1992) 7
Lamont v. *Postmaster General*, 381 U.S. 301 (1965) 14
Legal Servs. Corp. v. *Velazquez*, 531 U.S. 533 (2001) 16
National Endowment for the Arts v. *Finley*, 524 U.S. 569 (1998) 3
Perry Educ. Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) 8-9
Rosenberger v. *Rector & Vistors of the Univ. of Va.*, 515 U.S. 819 (1995) 10, 11
Rust v. *Sullivan*, 500 U.S. 173 (1991) 18
South Dakota v. *Dole*, 483 U.S. 203 (1987) 20
Watchtower Bible & Tract Soc'y of N.Y., Inc. v. *Village of Stratton*, 536 U.S. 150 (2002) 14
Widmar v. *Vincent*, 454 U.S. 263 (1981) 11

Constitution and statutes:

U.S. Const.:
Art. I, § 8, Cl. 1 (Spending Clause) 18
Amend. I 1, 2, 5, 6, 14, 17, 19, 20
Amend. X 20
Library Services and Technology Act, 20 U.S.C. 9121 *et seq.*:
20 U.S.C. 9121(2) 9
20 U.S.C. 9134(f)(1)(A) 19
20 U.S.C. 9134(f)(1)(B) 19
20 U.S.C. 9134(f)(3) 14
Telecommunications Act of 1996, 47 U.S.C. 251 *et seq.*:
47 U.S.C. 254(h)(1)(B) 9
47 U.S.C. 254(h)(6)(B) 19
47 U.S.C. 254(h)(6)(C) 19
47 U.S.C. 254(h)(6)(D) 14
42 U.S.C. 1983 3

Miscellaneous: Page

Caroline R. Richardson et al., *Does Pornography-Blocking Software Block Access to Health Information on the Internet?* 288 JAMA 2887 (2002) 12
S. Rep. No. 141, 106th Cong., 1st Sess. (1999) 4, 15

In the Supreme Court of the United States

No. 02-361

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

AMERICAN LIBRARY ASSOCIATION, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

I. CIPA DOES NOT INDUCE PUBLIC LIBRARIES TO VIOLATE ANY FIRST AMENDMENT RIGHTS OF THEIR PATRONS

Appellees' principal contention is that the First Amendment bars a public library from using filtering software to ensure that the library does not make pornographic visual depictions available to its patrons through its own computers on its own premises. From this premise, appellees then argue that the filtering provisions in the Children's Internet Protection Act (CIPA) are unconstitutional on their face because they induce public libraries to commit that constitutional violation. See Multnomah County Br. 24-42; ALA Br. 17-38. Appellees' submission is profoundly wrong. The First Amendment does not bar a public library from declining to be an intermediary in the purveying of pornography to people who enter its premises. To the contrary, such a judgment concerning what material to make available to its patrons conforms to the traditional practices and role of a library. More broadly, it conforms to the traditional latitude that the Constitution affords to the government in the expenditure and the utilization of its own property and resources.

Significantly, moreover, appellees do not challenge the district court's findings that there is an enormous amount of pornography on the Internet, J.S. App. 30a-31a, that library patrons, including minors, regularly search for such material, *id.* at 2a, that pornography falls outside the collection boundaries of most public libraries, *id.* at 33a, that filtering software is a reasonably effective way to keep pornography out of the library, *id.* at 90a-91a, and that a significant number of public libraries acting without any encouragement from Congress have chosen to use filtering software to accomplish that purpose, *id.* at 3a. Instead, appellees contend (Multnomah County Br. 24-29; ALA Br. 19-28) that because filtering software blocks pornography on the basis of its content, its use by a public library is subject to strict scrutiny under the First Amendment and may be justified only if narrowly tailored to further compelling government interests. That contention lacks merit.

A. Strict Scrutiny Does Not Apply To A Public Library's Content-Based Collection Decisions

Strict scrutiny does not apply to a public library's traditional exercise of judgment in deciding what material to collect for its patrons. Application of that standard to a library's collection practices would fundamentally alter the role of public libraries in our society, and replace librarians with judges in making day-to-day decisions respecting what material to include in or exclude from a library's offerings.

District court findings, largely ignored by appellees, demonstrate why that is so. Of crucial importance, the court found that in order to fulfill their traditional educational and informational mission, public libraries seek to collect material of "requisite and appropriate quality," J.S. App. 34a, and that, as a consequence, public libraries routinely consider the "content of the material" in deciding whether to add it to their collections. *Id.* at 35a. Accordingly, if strict scrutiny were applied to traditional collection practices, public librar-

ies could not perform their traditional role. Instead of public libraries deciding what material to include in their collections based on their assessment of its content, strict scrutiny would transfer that role to book authors, library patrons, and, ultimately, the courts. Under a strict scrutiny regime, any time a library refused to stock a book because it concluded that it did not contain content of suitable or appropriate quality, the author of the book or a library patron could challenge the decision as unconstitutional—including in a suit for damages under 42 U.S.C. 1983. A court would then be required to rule in favor of the challenge unless the public library could show that its decision was narrowly tailored to further a compelling interest.

No decision of this Court supports that notion. To the contrary, *Arkansas Educational Television Commission* v. *Forbes*, 523 U.S. 666 (1998), and *National Endowment for the Arts* v. *Finley*, 524 U.S. 569 (1998), establish that, when a government entity's mission entails the making of content-based decisions, strict scrutiny does not apply.

ALA asserts (Br. 23 & n.20) that *Forbes* and *Finley* are distinguishable because a public library will meet patron demand for lawful material through interlibrary loan. But the district court found that interlibrary loan "is expensive" and "therefore used infrequently." J.S. App. 34a. Even when cost is not an issue, the court found only that public libraries "typically will assist patrons in obtaining access" to lawful material, not that they always will. *Ibid.* And no decision of this or any other court has been located that even suggests that they have a First Amendment obligation to do so.

Moreover, the question here is whether public libraries may exercise their traditional discretion in deciding what material they will make generally available to the public in their own libraries, not the extent to which they will or must respond to particular patron requests for material that is at *another* library. For purposes of resolving that question, the

pertinent tradition is a library's approach to assembling its permanent collection, not its interlibrary loan policies. As the district court's findings make clear, with respect to its permanent collection, a library does not seek universal coverage, but material of "requisite and appropriate quality." J.S. App. 34a.

2. In the end, appellees implicitly concede that a public library's traditional collection practices are not subject to strict scrutiny. Instead, they argue that a public library's decisions concerning what material to make available to its patrons are judged by a different standard when that material is posted on the Internet. However, there is no sound reason that libraries should have less freedom to decide what material to make available on their Internet-connected computers than they have to decide what books, magazines, CD ROMS, movies, microfilm, or records they will make available. At bottom, a library's Internet-connected computers are simply "a technological extension of the book stack." S. Rep. No. 141, 106th Cong., 1st Sess. 7 (1999).

Consistent with that understanding, public libraries exercise judgment to exclude from their Internet-connected computers the same kinds of material that they categorically exclude from their physical collections, including material they view as offensive, tasteless, inappropriate, graphically violent, or pornographic. J.S. App. 37a; GXs 71, 83, 99, 247. Under appellees' theory, even though a public library's judgment to exclude such material from numerous other collections is entirely permissible, precisely the same judgment becomes constitutionally suspect when applied to a library's Internet-connected computers. Furthermore, under appellees' theory, a library's judgment not to permit access to e-mail, chat rooms, game sites, or dating services would be subject to either strict scrutiny or the heightened scrutiny that is applicable to time, place, and manner restrictions in a traditional public forum.

Appellees' approach lacks coherence. If a public library has broad discretion—as it surely does—to refuse to collect pornographic magazines, XXX videos, and other material that can be readily found at the nearest adult book store, or any of a myriad other available Internet-connected computers, it should have the same discretion to exclude that material from its computer monitors.

3. Appellees nonetheless struggle, and not without considerable irony, to distinguish a public library's Internet collection practices from its more traditional collection practices, and to impose stringent First Amendment burdens on libraries that simply do not exist in the law. None of their purported distinctions withstands analysis.

a. Multnomah County argues (Br. 39) that a public library's traditional collection practices are distinguishable because CIPA mandates filtering software for all public libraries and overrides local decisions. CIPA does not impose any such mandate. CIPA applies only to those public libraries that wish to receive Internet-related federal financial assistance and agree to accept filtering in order to do so. Those voluntary decisions by public libraries in assembling their collections are entitled to just as much deference as other collection practices. CIPA's effect is the same as if a private donor contributed funds to a library to build its collection on the condition that it not use the funds to purchase pornography. The First Amendment surely allows the library to make the choice to accept such conditional grants from public as well as private donors. Moreover, Multnomah County's purported distinction provides no support for the district court's holding that public libraries that use filtering software, even without any federal assistance, violate the First Amendment rights of their patrons.

b. Appellees also contend (Multnomah County Br. 39; ALA Br. 24) that libraries' Internet collection practices are different from their book selection practices because librar-

ies pre-approve the books they make available, but do not pre-approve the Web sites they make available. Appellees do not explain why a library's discretion to make choices disappears when it decides what not to accept rather than what affirmatively to accept. A public library could, of course, limit its Internet collection to just those sites it pre-screened, but only at the cost of excluding an enormous amount of valuable information that it lacks the capacity or resources to review. Faced with that choice, it is eminently reasonable for a public library to choose not to pre-screen all material, but instead to focus on the categories of material it determines to be inappropriate, wasteful, unnecessary or incompatible with its policies. Indeed, because that approach makes *more* information available than the alternative of offering only pre-selected sites, it is difficult to understand why either appellees or the First Amendment would favor mandatory pre- screening.

c. Appellees also err in contending (Multnomah County Br. 40-41; ALA Br. 24) that a library's Internet collection is distinguishable from its book collection because filtering software companies do the hard and resource-intensive work of choosing which particular Web sites to exclude, while librarians generally choose the books that are included. Libraries exercise significant editorial judgment in selecting both the particular software they use and the filtering categories they will enable. When a library chooses to enable the pornography category, that is comparable to a judgment not to collect pornographic books. Libraries also retain the capacity to determine whether the filter is excluding sites that the library would prefer to make available, and they can simply adjust the filters to unblock those sites. J.S. App. 52a. Thus, when library staff members determine that filtering software excludes sites that are not pornographic, they can adjust the filter to unblock those sites.

Moreover, in developing their book collections, libraries also rely on third parties. They often rely on journal reviews and bibliographies to select their books, and they sometimes delegate to third-party vendors the task of supplying books that satisfy their collection standards. J.S. App. 35a. ALA seeks to distinguish that practice on the ground that public libraries retain ultimate control over their book collections. But since libraries can add or delete sites from a blocking category, the same is true of their Internet collections.

B. A Library's Internet-Connected Computers Are Not Analogous To A Traditional Public Forum

Multnomah County contends (Br. 24-26) that strict scrutiny applies to a public library's use of filtering software to block material covered by CIPA because a library's Internet-connected computers are analogous to a traditional public forum. That contention is utterly unsustainable. Traditional public forum principles apply only to those places, such as public streets and parks, that have "immemorially been held in trust for the use of the public and, time out of mind, * * * been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 679 (1992). The Court has explicitly "rejected the view that traditional public forum status extends beyond its historic confines." *Forbes*, 523 U.S. at 678.

In any event, there is no coherent analogy between Internet access on a computer screen in a public library and a traditional public forum. Multnomah County argues (Br. 24) that the two are analogous because a public library is a quintessential locus for the receipt of a wide array of information. But public sidewalks and parks are not traditional public fora because they are places where a wide array of information may be received. In fact, the range of information they afford may often be quite limited. Rather, parks and sidewalks are public fora because private speakers, and not the

government, have always determined the content of the speech that a person may receive there. In contrast, the amount and nature of information that may be obtained in a public library has always been determined by the public library itself, within the funding and other limitations set by the governmental body that established and supports it.

Nor is appellees' analogy assisted by Multnomah County's observation (Br. 26) that the Internet contains more information than is available in a traditional public forum. The Internet itself is not at issue here. Instead, what is at issue is the material from the Internet that a library chooses to make available on its own computers on its own premises. If a library's status as a place to obtain information and its willingness to provide a wide array of information to the public were sufficient to trigger the doctrines applicable to a traditional public forum, strict scrutiny would also apply to a public library's content-based book selections. That consequence of appellees' theory demonstrates that their analogy is fundamentally misconceived. While a public library is generally—but not always—a place where a wide array of information may be obtained, the information that may be obtained has always been whatever the library chooses to provide, and nothing more.

C. A Public Library's Internet-Connected Computers Are Not Designated Public Fora, But Even If They Were, The Library's Content-Based Collection Decisions Would Not Be Subject To Strict Scrutiny

1. Appellees are also mistaken in contending (Multnomah County Br. 27-29; ALA Br. 19-22) that a public library's Internet collection decisions are subject to strict scrutiny because libraries create a designated public forum when they furnish material from the Internet. A designated public forum is created only when the government makes an affirmative choice to open up its property for use as a public forum, *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*,

460 U.S. 37, 46 (1983), not "by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius* v. *NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

Under those principles, a public library that installs computer terminals on its premises and connects them to the Internet does not thereby create a designated public forum. The computer terminals are simply added to and subsumed in the overall resources of what is, after all, a *library*, and the computer terminals thus assume the essential character of the other resources the library has assembled in aid of its mission. Accordingly, a library that acquires computer terminals and connects them to the Internet cannot properly be understood as "intentionally" opening up its facilities, equipment, and Internet collection as a forum for "public discourse" by Web publishers within the meaning of this Court's cases, *Cornelius*, 473 U.S. at 802—any more than a library's acquisition of books for its collection creates a designated public forum for "public discourse" by authors and publishers. Rather, the library has made its information-gathering tools available to its patrons to be used in the way that a library's collection, including other reference material, generally is used. See *id.* at 801-802, 805-806.

That is especially so with respect to a public library that connects to the Internet with federal assistance. E-rate discounts are available only for "educational" purposes, 47 U.S.C. 254(h)(1)(B), and assistance under the Library Services and Technology Act is intended "to stimulate excellence and promote access to learning and information resources" in libraries. 20 U.S.C. 9121(2). A public library that connects to the Internet with federal assistance necessarily seeks to further those purposes, and not some broader goal of opening a public forum for public discourse by Web publishers. The library's Internet-connected computers therefore are simply information-gathering tools that, consistently

with the limitations Congress has imposed, serve to supplement the library's traditional collections.

Appellees contend (Multnomah County Br. 28; ALA Br. 20-21) that a public library's Internet-connected computers become designated public fora because of the breadth of information that is available on them. But if that were sufficient to create designated public fora, a public library's bookshelves would also qualify. And if that were the test, public television stations would create a designated public forum by offering diverse programming, and the National Endowment for the Arts would create a designated public forum by funding a wide array of art. As those examples demonstrate, a designated forum is not created simply because the government chooses to furnish a wide array of information—especially where, as here, it does so through its own equipment on its own premises.

2. Even if a public library that connects to the Internet with federal assistance has thereby created a designated public forum, that forum would necessarily be limited to the educational and informational purposes for which it was created. *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). In the context of limited public fora, the Court has drawn a distinction between content-based and viewpoint-based distinctions. *Id.* at 829-830. A content-based limitation is permissible if it is reasonable in light of the purposes of the designated forum. *Ibid.* A viewpoint-based exclusion, by contrast, is presumptively impermissible. *Ibid.* --

The use of filtering software to block access to pornographic material covered by CIPA is content-based, not viewpoint-based. Accordingly, even if a library's Internet-connected computers were treated as a designated public forum, the use of filtering software to block access to material covered by CIPA would not be subject to strict scrutiny. Instead, the relevant question would be whether the use of

filtering software is reasonable in light of the informational and educational purposes of that designated public forum. Plainly, a library could permissibly conclude that the exclusion of Internet pornography is reasonably related to those purposes, just as libraries have traditionally done respecting pornographic books.

The designated public forum cases cited by appellees are consistent with that analysis. In *Rosenberger*, 515 U.S. at 831-832, the Court applied strict scrutiny to an exclusion from a designated public forum based on religious viewpoint. The exclusion invalidated in *Widmar* v. *Vincent*, 454 U.S. 263, 269-270, (1981), was also based on religious viewpoint. Similarly, in *City of Madison School District No. 8* v. *Wisconsin Employment Relations Commission*, 429 U.S. 167, 175-176 (1976), the Court subjected to strict scrutiny and invalidated a law that allowed "one side of a debatable public question to have a monopoly in expressing its views to the government."

ALA contends (Br. 26-27) that permitting the government to define the forum through the use of reasonable content-based distinctions would empty designated public forum analysis of any meaning. That concern is misguided. As *Rosenberger* makes clear, the government may not define a designated forum in terms of particular viewpoints, and then justify viewpoint-based distinctions as tailored to further the purposes of the forum. In addition, any content-based exclusions that are not viewpoint-based must still be justified as reasonable in light of the purposes of the forum.

D. Filtering Software Is A Reasonable Means For A Library To Ensure That It Does Not Furnish Pornography To Its Patrons

1. Appellees err in contending (Multnomah County Br. 29-32; ALA Br. 29-30) that the use of filtering software is constitutionally deficient because all leading commercial filters block some constitutionally protected speech. Just as

a library may choose not to purchase a book or magazine that has both pornographic and non-pornographic content, it may reasonably conclude that it is better to have an effective mechanism for blocking pornographic material than it is to abandon any such safeguard in order to guarantee that no single constitutionally protected Web site is excluded.

Appellees vastly overstate the amount of material that is erroneously excluded by filtering software. The district court estimated that tens of thousands of Web pages are erroneously blocked. J.S. App. 93a. But that represents a minute percentage of the two *billion* pages that are on the Internet. *Id.* at 30a. The district court's finding is consistent with evidence offered by appellees' own expert. Of the sites he examined, less than 1% were erroneously blocked. *Id.* at 79a-85a.[1] A recently released study shows that a filter set to block only pornography blocks only 1.4% of all health sites. Caroline R. Richardson et al., *Does Pornography-Blocking Software Block Access to Health Information on the Internet?*, 288 JAMA 2887, 2891-2892 (2002).[2] Other evidence in the record shows that an even smaller percentage of material sought by library patrons is actually blocked.[3] Accordingly, a patron will only infrequently confront a site that is erroneously blocked. Moreover, because a standard Internet search ordinarily produces multiple sites addressing the same topic, an erroneous block will not have significance unless the person conducting the search is looking for information that can only be found on that one site.

[1] Appellees disavow (Multnomah County Br. 30 n.2; ALA Br. 32 n.31) the significance of their expert's testimony, but the district court relied on that testimony, J.S. App. 84a-85a, and appellees have not shown that reliance to be clearly erroneous. There is no reason to believe that the estimate based on the testimony of appellees' expert significantly understates the percentage of erroneous blocks. Indeed, appellees' expert skewed his results in two ways that would tend to overestimate the percentage of sites erroneously blocked. First, his sample consisted of sites that were more likely to be erroneously blocked. *Id.* at 85a. Second, he counted a site as erroneously blocked if any one of the software programs erroneously blocked it. *Id.* at 79a.

[2] ALA notes (Br. 32-33 n.31) that the same study shows that a filter set to block pornography blocks 10% of the sites using the search terms safe sex, condom, and gay. 288 JAMA at 2891. That still leaves 90% of those sites accessible. A library collection that contained 90% of all books on a particular topic would be extraordinarily inclusive, not constitutionally suspect. The same is true for Web sites.

If that happens, a patron need only ask a librarian to unblock the site. As the district court found, a library has the capacity to permanently unblock any erroneously blocked site. J.S. App. 52a. Asking a librarian to unblock a site is no different from requesting a librarian to retrieve a book that is not on the library's open stacks or to obtain a book by interlibrary loan. ALA complains (Br. 37) that CIPA permits, but does not require, a library to unblock an erroneously blocked site. That complaint is misguided. The district court found that libraries routinely respond to requests to unblock erroneously blocked sites. J.S. App. 46a. Moreover, librarians have a professional duty to assist patrons in finding information, and ALA offers no reason to believe that they will shirk that responsibility when it comes to responding to unblocking requests. In any event, the possibility that they might do so does not render CIPA itself unconstitutional, either on its face or as applied.

Multnomah County notes (Br. 35) that CIPA establishes certain limitations on disabling a filter. But those limitations apply only when a library wishes to disable the filter altogether, thereby permitting access to material that is child pornography, obscene, or harmful to minors. A library that receives Internet-related federal assistance has *unrestricted* freedom to unblock *any* site that does not fall within those

[3] Biek Test. 76 (Tacoma filter intercepts occur in .5%-.6% of the attempts to load a URL); Joint Exh. 6 (McBride Dep.), at 47 (at Greenville County Library System, the ratio of blocked sites to sites requested is approximately .005%).

categories. Appellees persistently blur the distinction between unblocking and disabling, but they are two very different ways of assisting patrons who wish to view blocked material.

Even with respect to disabling, CIPA's limitations are minimal. Under CIPA, at least with respect to adults, a filter may be disabled for any lawful purpose. 20 U.S.C. 9134(f)(3) (disabling permitted for both adults and minors); 47 U.S.C. 254(h)(6)(D) (disabling permitted for adults).

Appellees argue (Multnomah County Br 36-37; ALA Br. 37-38) that unblocking and disabling are inadequate because some patrons may be too embarrassed to ask for assistance from a librarian, and because a request may not be processed immediately. J.S. App. 172a. That criticism is unpersuasive. Requesting assistance is the standard way to obtain books in a closed stack, behind the reference desk, or through interlibrary loan. Similarly, a library patron seeking a book that has been checked out or a book that can be obtained only through interlibrary loan must ordinarily wait some period of time before obtaining it. There is no reason that the Constitution should require a library to adopt a different set of procedures to handle unblocking requests. But to the extent that a library may wish to take additional measures to facilitate unblocking requests, such as permitting them to be made anonymously, or expediting their processing, nothing in CIPA precludes it from doing so.[4] And if libraries are

[4] Because of the distinctive features of public libraries, appellees err in relying on decisions in which the Court has condemned schemes that required persons to seek permission to engage in activity protected by the First Amendment. *Lamont* v. *Postmaster Gen.*, 381 U.S. 301 (1965) (permission to receive certain mailings); *Denver Area Educ. Telecom. Consortium, Inc.* v. *FCC*, 518 U.S. 727 (1996) (request to receive sexually explicit programming); *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Village of Stratton*, 536 U.S. 150 (2002) (permission to conduct door-to-door canvassing). The routine practice of seeking assistance from a professional librarian in obtaining material from the library's own collection is nothing like the schemes at issue in those cases.

unwilling to unblock particular sites, the sites are available on countless Internet-connected computers throughout the country.

2. Appellees contend (Multnomah Br. 33-34; ALA Br. 34-35) that there are less restrictive and equally effective ways to preclude library patrons from receiving access to illegal and harmful pornography on library computers. However, they conspicuously fail to defend the principal alternative identified by the district court—a tap-on-the-shoulder policy. Appellees apparently share the government's view (Gov't Br. 37-38) that such a policy is far more intrusive, restrictive, inefficient, ineffective, and burdensome on library staff than filtering software.

Multnomah County proposes (Br. 33-34) as a less restrictive alternative that a library simply announce its policy and hope that library users who agree to comply with it will do so. Evidence in the record shows that even a policy that is enforced through active monitoring is not as effective as the use of filtering software in preventing deliberate efforts to obtain pornography. J.S. App. 40a. A policy that does not involve any active monitoring, like the one Multnomah County proposes, would be even less effective. In addition, the process of securing such agreements would pose extra burdens on both library staff and patrons, and would require a library staff to bring up the subject of pornography with patrons in a way that could be offensive to the patrons and detract from their use of the library.

ALA proposes (Br. 35) as its featured alternative that a library offer optional filtering software to adults, and require young minors to obtain parental permission to use an unfiltered computer. ALA's optional filtering alternative does nothing to address a library's legitimate concern that many adults in public libraries deliberately use the library's computers to seek pornography on the Internet. ALA's parental consent proposal is equally flawed. Libraries have a legiti-

mate interest in ensuring that their computers are not used by minors to obtain pornography, regardless of whether parents give them permission to do so.[5]

3. Appellees' attack on filtering software ultimately reduces to an argument that it is not a perfect solution to the problem. But even when strict scrutiny applies, perfection is not required. Here, however, strict scrutiny is not applicable. Rather, at most, a library that uses filtering software must show that it is a reasonable way to further the library's traditional educational and informational mission. Appellees' objections do not come close to showing that filtering software fails to satisfy that standard.

II. CIPA DOES NOT IMPOSE AN UNCONSTITUTIONAL CONDITION ON THE RECEIPT OF FEDERAL ASSISTANCE

1. Appellees contend (Multnomah County Br. 45-48; ALA Br. 38- 50) that the district court's judgment may be affirmed on the alternative ground that CIPA imposes an unconstitutional condition on the receipt of federal assistance. Relying on *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533 (2001), they argue that CIPA's filtering conditions "distort" the function of public libraries (Multnomah County Br. 48) and "suppress speech inherent" in those libraries (ALA Br. 48). Appellees' reliance on *Velazquez* is wholly misplaced. In that case, the federal funding program prohibited attorneys from advocating against the government —a role that was perceived in that context to be indispensable to the proper functioning of the judicial process. The

[5] The other alternatives suggested by appellees—privacy screens, recessed monitors, training on Internet use, placing computers in areas of high traffic either do not address a library's interest in preventing its computers from being used by persons who seek out material covered by CIPA, or are substantially less effective than filtering software. See Gov't Br. 38-39. Those alternatives also are not as effective in preventing inadvertent exposure to material covered by CIPA. *Id.* at 39.

funding restriction also disfavored certain speech based on its viewpoint. Neither of those distinctive features is present here. Public libraries do not have an adversarial relationship with the government that would be compromised by accepting federal funding on the conditions established under CIPA, and those conditions do not make any distinctions based on viewpoint.

Moreover, CIPA's conditions do not in any sense distort a library's function or suppress speech inherent in that setting. Neither the collection of pornographic visual depictions nor the provision of unfiltered Internet access is inherent in the traditional role of public libraries. Libraries have never had as their goal "universal coverage," J.S. App. 34a, and indeed have historically *not* included pornography in their collections. Thus, many libraries have found that filtering software furthers rather than distorts their traditional educational and informational mission, because it gives them the flexibility to block access to material that is outside their collection boundaries, while reserving use of their computers for legitimate research and information gathering. And because CIPA permits unblocking, libraries that wish to provide the maximum amount of lawful information are free to do so.

ALA asserts (Br. 41-42) that CIPA distorts a public library's function and suppresses speech inherent in that setting simply because it removes discretion from public libraries to decide for themselves whether to use filtering software. That assertion is inconsistent with ALA's contention elsewhere (Br. 17-38) that public libraries lack any discretion at all under the First Amendment to use filtering software. It also is without merit. To the extent that libraries wish to offer unfiltered access, they are free to do so without federal assistance. If a library wishes to receive federal assistance, however, Congress has wide latitude to

establish conditions that ensure that the assistance will be used for the purposes that Congress intended.

Rust v. *Sullivan*, 500 U.S. 173 (1991), is controlling on that point. In that case, the Court held that Congress has authority to insist "that public funds be spent for the purposes for which they were authorized." *Id.* at 196. ALA errs in characterizing *Rust* (Br. 40-41 & n.39) as a case involving government speech. The *Rust* Court held that Congress could impose the funding condition because "when the Government appropriates public funds to establish a program, it is entitled to define the limits of that program." 500 U.S. at 194. Here, Congress has defined its program as one that seeks to facilitate Internet access at libraries for educational and informational purposes, which Congress has reasonably determined should entail corresponding restrictions on using the program to make available material that is obscene, child pornography, or harmful to minors. Because the use of filtering software helps to carry out the program as so defined, it is a permissible condition under *Rust*.

2. Appellees alternatively contend (Multnomah County Br. 45-46; ALA Br. 43-44) that CIPA exceeds permissible limits because it applies to every computer at a library that receives assistance, even those purchased and connected without federal assistance. As an initial matter, that question does not need to be resolved in this facial challenge. If a particular library wishes to use non-federal funds to offer unfiltered access on a particular computer at the library, it may raise that issue in an as-applied challenge. In any event, CIPA's "any computer" condition is a permissible exercise of Congress's spending power. Under the Spending Clause, Congress is entitled to "require[] a certain degree of separation" from the E-rate and LSTA programs "in order to ensure the integrity" of those programs. *Rust*, 500 U.S. at 198. Permitting public libraries to offer unfiltered access at

the very facilities that receive Internet-related assistance would undermine the integrity of those federal programs.

Multnomah County errs in arguing (Br. 45-46) that CIPA's "any computer" condition conflicts with this Court's decision in *FCC* v. *League of Women Voters*, 468 U.S. 364, 400 (1984). In that case, the Court invalidated a funding restriction on editorializing because it prohibited recipients from editorializing through a separate affiliate. *Ibid.* CIPA does not suffer from that vice. A recipient that wishes to offer unfiltered access outside the scope of the federal program may do so through an affiliated library that does not receive federal Internet-related assistance.

ALA is mistaken in claiming (Br. 44) that CIPA does not afford that option. Under its express terms, CIPA's conditions attach only to the computers of the particular libraries that receive Internet-related assistance. 20 U.S.C. 9134(f)(1)(A) and (B); 47 U.S.C. 254(h)(6)(B) and (C). An affiliated library receiving no federal assistance is therefore not covered. That is the way the federal enforcement agencies interpret CIPA, and that interpretation is consistent with both CIPA's text, and the principle that statutes should be interpreted to avoid constitutional questions, not to create them.

3. While the foregoing is sufficient to show that CIPA is not invalid on its face as imposing an unconstitutional condition, there is also a substantial question whether appellees may assert an unconstitutional conditions claim at all. The courts of appeals have uniformly concluded that government entities are not protected by the First Amendment. Gov't Br. 40-41. Moreover, while appellees wish to assert the rights of their patrons, this Court has never held that an unconstitutional conditions claim may be asserted on behalf of persons upon whom no conditions have been imposed. See *id.* at 41-42. All of the cases cited by appellees for that proposition (Multnomah County Br. 46; ALA Br. 45-46)

involved one or more recipients upon whom an allegedly unconstitutional condition had been imposed, so the Court had no occasion to resolve the question.[6]

ALA contends (Br. 48-49) that if municipalities have no First Amendment rights, there is no limit on the speech restrictions that Congress could impose on municipalities directly or though funding conditions. That contention is incorrect. The Tenth Amendment would place some limits on direct restrictions, and the Spending Clause requires that any speech-related or other conditions must be related to the purposes for which the assistance is provided. See *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987).[7]

* * * * *

The judgment of the district court should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

FEBRUARY 2003

---

[6] The Court's decision in *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), does not assist appellees. The Court's holding that a private corporation may assert that restrictions on its speech violate the First Amendment does not imply that a public entity may.

[7] Multnomah County errs in arguing (Br. 42-45) that a public library's use of filtering software constitutes an impermissible prior restraint on speech. A library's use of filtering software is no more a prior restraint on speech than is its refusal to provide patrons with pornographic magazines. Both are collection decisions that affect only what material may be obtained from the library, not from private sources. Multnomah County sees a difference where the use of filtering software results from CIPA, rather than a local library's own decision. But where CIPA applies, local libraries have voluntarily agreed to install filtering software as a condition of receiving federal Internet-related assistance. The installation of such software therefore *does* result from local library decisions. In any event, prior restraint doctrine does not depend on whether an action is locally or federally inspired, but on whether the action is a prior restraint on speech. CIPA imposes no such restraint.